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In the Supreme Court of the United States

OCTOBER TERM, 1975

JOHN T. DUNLOP, SECRETARY OF LABOR, AND F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANTS

v.

TURNER ELKHORN MINING COMPANY, ET AL.

TURNER ELKHORN MINING COMPANY, ET AL. APPELLANTS

v.

JOHN T. DUNLOP, SECRETARY OF LABOR, AND F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

BRIEF FOR THE FEDERAL PARTIES

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1302

JOHN T. DUNLOP, SECRETARY OF LABOR, AND F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANTS

v.

TURNER ELKHORN MINING COMPANY, ET AL.,

No. 74-1316

TURNER ELKHORN MINING COMPANY, ET AL., APPELLANTS

v.

JOHN T. DUNLOP, SECRETARY OF LABOR, AND F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

BRIEF FOR THE FEDERAL PARTIES

OPINION BELOW

The opinion of the district court (J. S. 1A-13A) is reported at 385 F. Supp. 424.[1]

JURISDICTION

The judgment of the district court was entered on November 20, 1974 (J.S. 14A-15A).

The federal parties filed a motion to amend the judgment (J.S. 16A-17A) on December 2, 1974, which was denied on December 18, 1974 (J.S. 29A-30A).[2] They filed their notice of appeal to this Court on January 16, 1975 (J.S. 31A). By order of March 10, 1975, Mr. Justice Stewart extended the time for docketing the appeal to and including April 16, 1975, and it was docketed on that date.

The plaintiffs filed a notice of appeal to this Court on January 20, 1975 (J.S. No. 74-1316, 1c-3c). By order of March 10, 1975, Mr. Justice Stewart extended the time for docketing the appeal to and including April 19, 1975, and it was docketed on April 18, 1975.

This Court noted probable jurisdiction in both cases on June 9, 1975, and consolidated them for review (A. 46). The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

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[1] "J.S." refers to the Jurisdictional Statement in No. 74-1302.

[2] "Federal parties" refers to the appellants in No. 74-1302 and the appellees in No. 74-1316. "Plaintiffs" refers collectively to the private parties, appellants in No. 74-1316 and appellees in No. 74-1302.

QUESTIONS PRESENTED

No. 74-1302

1. Whether Section 411(c)(3) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. (Supp. III) 921(c)(3), which provides for compensation to miners with complicated pneumoconiosis whether or not the miner is functionally disabled, is consistent with the Constitution.

2. Whether Congress, which created in Section 411(c)(4) of the Act, as amended, 30 U.S.C. (Supp. III) 921(c)(4), a presumption that a miner who has worked 15 or more years in coal mines and who has a totally disabling respiratory or pulmonary impairment is totally disabled due to pneumoconiosis, violated the Constitution by providing that the presumption may be rebutted only by evidence that the miner did not have pneumoconiosis, or that the impairment did not arise out of employment in a coal mine.

No. 74-1316

1. Whether the provisions of the Act requiring coal mine operators to pay benefits to their former employees (or their survivors) in connection with occupational disease caused by employment prior to its enactment are unconstitutional.

2. Whether the Act is unconstitutional because it contains eligibility criteria and presumptions that require benefits to be paid to claimants suffering from nonwork-related diseases, claimants whose dis-

eases may not be work-related, and claimants who are not totally disabled.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article I, Section 8 of the Constitution provides in relevant part:

> The Congress shall have Power * * *
>
> * * * * *
>
> To regulate Commerce * * * among the several States * * *
>
> * * * * *
>
> To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, * * *.

2. The Fifth Amendment to the Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *.

3. The relevant portions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792 (30 U.S.C. 901 *et seq.*), as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150 (Supp. III), are set out in the Appendix to plaintiffs' brief at 1a-9a.

STATEMENT

Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, as amended by

the Black Lung Benefits Act of 1972, 86 Stat. 150, 30 U.S.C. 901 *et seq.* (the Act), provides for the payment of benefits to coal miners suffering from pneumoconiosis, and to survivors of miners who have died from the disease or while totally disabled by it. Under Title IV, coal mine operators are liable for the payment of certain benefits to miners they have employed. 30 U.S.C. 932.

A. The Statutory Program

1. Coal miner's pneumoconiosis, or black lung disease, is a chronic respiratory ailment caused by the long-term inhalation of coal dust, which causes scarring and degeneration of lung tissue. There is no cure for the disease, which is irreversible. Although, in its earlier stages, pneumoconiosis may not prevent an individual from engaging in employment, it eventually limits severely the capacity of the lungs and their ability to fight infection, and produces total disability and death. The disease also makes the individual more susceptible to emphysema, heart disease, lung cancer, tuberculosis, chronic bronchitis and other diseases, and so can produce death indirectly.[3] Because black lung is a progressive disease, its symptoms may not appear until long after exposure to the coal dust. By the time it is detected and diagnosed, the employment that caused the disease may long since have ceased.

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[3] Hearings on S. 355, S. 467, *et al.* (Coal Mine Health and Safety) before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess., Part 3, A20-28 (1969) (hereafter 1969 Senate Hearings).

As the Surgeon General of the United States testified,[4] pneumoconiosis was recognized as a disease in Great Britain by 1943, and in this country in the 1950s. Studies spanning 1959-1961 and 1963-1965 confirmed its prevalence among coal miners. In the 1969 hearings, the Surgeon General estimated that the disease affected at least 100,000 of the nation's active and inactive coal miners. One out of ten active miners and one out of five inactive miners suffer from the disease.[5] These figures may understate the problem; doctors familiar with the disease estimate that half of all miners eventually become disabled by it.[6] In one study involving one thousand autopsies of miners in Beckley, West Virginia, 85 percent were afflicted with the lung lesions and fibrosis characteristic of pneumoconiosis.[7] Coal miners die from respiratory diseases five times more often than do members of the general population.[8]

The dimensions of the problem are also illustrated by the number of successful claimants under the Act. 547,000 claims were filed under the federally-funded portion of the Act (see p. 9, *infra*), and the Social Security Administration allowed the claims of 482,000 miners and dependents (Department of Health, Education, and Welfare, Fourth Annual Report to Congress on the Administration of Part B of Title IV of the Federal Coal Mine Health and Safety Act of 1969, p. 5 (1975)).

[4] 1969 Senate Hearings, *supra*, n. 3, Part 2, at 719.

[5] 1969 Senate Hearings, *supra*, n. 3, Part 2, at 720-730.

[6] 1969 Senate Hearings, *supra*, n. 3, Part 2, at 641.

[7] *Ibid.*

[8] 1969 Senate Hearings, *supra*, n. 3, Part 3, at 1342.

2. Congress found that state workers' compensation laws did not provide adequate coverage for black lung disease, particularly in cases where miners had ceased working before the disease became manifest.[9] In some States the time provided for claiming benefits expired before the symptoms alerted a victim that he had the disease. Other States did not provide coverage for occupational disease. Still others provided payments inadequate to compensate the miner.

In order to prevent the occurrence of black lung disease and ameliorate its consequences, Congress included in the Act two basic measures. First, Title II of the Act set a limit on the amount of dust that could be present in the ambient air of coal mines. 30 U.S.C. 842. Cf. 30 U.S.C. 841(b).[10] Second, the Act provides that compensation shall be paid to all coal miners who are "totally disabled" by pneumoconiosis arising out of employment in coal mines, and

[9] 30 U.S.C. (Supp. III) 901; H.R. Rep. No. 91-563, 91st Cong., 1st Sess. 13 (1969). House and Senate Debates are reprinted, along with the House, Senate and Conference Reports, in a Committee Print, Legislative History, Federal Coal Mine Health and Safety Act, House Committee on Education and Labor, 91st Cong., 2d Sess. (1970) (hereafter cited as Leg. His.). See Leg. His. at 328.

[10] See generally H.R. Rep. No. 91-563, *supra*, n. 9, at 14-20, 40-42; S. Rep. No. 91-411, 91st Cong., 1st Sess. 7-8, 14-21 (1969).

to the surviving dependents of coal miners whose death was due to the disease. Through a series of definitions, presumptions, and methods of refutation contained in Title IV, the Act provides that any miner suffering from "complicated" pneumoconiosis—the last and terminal stage of the disease—receives this compensation whether or not he is able to engage in alternative work, whereas miners with less-advanced black lung receive compensation only if physically disabled by the disease. Because pneumoconiosis shares many of the attributes of other respiratory and pulmonary diseases, the disease is defined in general and symptomatic terms. If the symptoms are present in long-time miners, the disease is presumed to be present, subject to refutation if a mine operator can demonstrate that the disease is not pneumoconiosis, or that the afflicted individual could not have acquired such a disease as a result of exposure to dust in its mines.

3. The Act divides the financial responsibility for the payment of benefits into three components. The first component is contained in Part B of Title IV of the Act. Claims filed between December 30, 1969 (the date of enactment) and June 30, 1973, are adjudicated by the Secretary of Health, Education and Welfare, and paid by the Social Security Administration (30 U.S.C. (1970 ed. and Supp. III) 921-924).[11]

[11] Pursuant to 30 U.S.C. (Supp. III) 924, certain survivors' claims filed prior to January 1, 1974, also are the responsibility of the Social Security Administration.

The Part B program is paid for out of the general revenues of the United States.

The second component is established by Section 415 of the Act (30 U.S.C. (Supp. III) 925). Claims filed between July 1 and December 31, 1973, are adjudicated and paid by the Secretary of Labor. Federal payments to these claimants terminated on December 31, 1973, and the claimant's coal mine employer assumed responsibility to make continuing payments (see description of Part C, *infra*). Coal mine operators were notified of the pendency of a Section 415 claim for which they may later have become liable and have been afforded an opportunity to participate in the adjudication of those claims.

Part C, the third component of Title IV (30 U.S.C. (Supp. III) 931-941), provides that claims filed after December 31, 1973, shall be processed under an approved state workers' compensation law. If the claimant's State does not have a black lung compensation law approved by the Secretary of Labor, the claim is filed with the Secretary of Labor. The coal industry bears the primary responsibility for payment of claims under Part C. Preliminary payments, pending adjudication, are made by the Secretary of Labor, but any coal mine operator finally determined to be responsible must reimburse the Secretary and becomes responsible for payment of future benefits.

Part C provides that employers will be liable for all claims filed through 1981.[12] Because the Act contains

[12] Section 422(e)(3), 30 U.S.C. (Supp. III) 932(e)(3).

a three-year statute of limitations, employers are responsible only for pneumoconiosis discovered after the initial passage of the Act in 1969. Section 422(f)(1), 30 U.S.C. (Supp. III) 932 (f)(1).[13] Claimants who qualify for benefits receive these benefits for as long as they continue to meet the statutory criteria; because pneumoconiosis is progressive and irreversible, almost all claimants will receive benefits for the rest of their lives, or until the statutory program expires.[14] If a miner dies because of pneumoconiosis his survivors are entitled to benefits.[15]

Claims filed under Section 415 or Part C are adjudicated by means of the procedures provided for in

[13] But see Section 415, 30 U.S.C. (Supp. III) 925, governing the six-month transitional period. The Department of Labor has taken the position that no statute of limitations applies to claims filed during that period.

[14] Benefits are paid at a rate equal to 50 percent of the minimum monthly payment to which a disabled federal employee in grade GS-2 would be entitled. See 30 U.S.C. 922(a)(1). That sum is currently $187.40 per month. These benefits are increased if the claimant has dependents; the maximum increase is 100 percent if the claimant has three or more dependents (30 U.S.C. (Supp. III) 922(a)(3)). The benefits are reduced, as provided by 30 U.S.C. (Supp. III) 922 (b) and 932(g), to account for some alternative sources of income. Mine operators also are responsible for claimants' medical expenses. See 20 C.F.R. 720.109(a), 725.102(a).

[15] 30 U.S.C. 922(a)(2); (Supp. III) 922(a)(3) to (a)(6). For purposes of simplicity, claims by miners or by their survivors are referred to generically in this brief as miners' claims for compensation.

the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1435, 1436, as amended, 33 U.S.C. (Supp. III) 919 and 921.[16] Claimants and mine operators are entitled to a hearing conducted in accordance with the provisions of the Administrative Procedure Act (5 U.S.C. 554), to appeal to an independent Benefits Review Board, and to review by a United States court of appeals.[17]

B. Prior Judicial Proceedings

An association of mine operators brought suit challenging substantially all of the provisions of Title IV of the Act and the Secretary of Labor's implementing regulations. The complaint alleged that the regulations were unauthorized by the Act and that, if the regulations were authorized, then the Act is a taking of property without just compensation, is a retroactive impairment of contracts, and deprives the mine operators of due process of law. A three-judge district court in the District of Columbia upheld each of the challenged provisions of the Act, and this Court summarily affirmed. *National Independent Coal Operator's Association* v. *Brennan*, 372 F. Supp. 16 (D. D.C.), affirmed, 419 U.S. 955. Faced with a direct assault on the constitutionality of all major provisions of Title IV, the district court held (372 F. Supp. at

[16] Sections 415(a) and 422(a), 30 U.S.C. (Supp. III) 925 (a), 932(a).

[17] 33 U.S.C. (Supp. III) 921.

23): "Congress had the constitutional power to enact Title IV of the Act." Appellants' Jurisdictional Statement in that case (No. 73-1902) contended that the Act retroactively impairs contracts and that presumptions and limitations on rebuttal evidence contained in Title IV are irrational and unconstitutional (J.S. No. 73-1902 at 13-15); this Court rejected those contentions by summarily affirming. See *Fusari* v. *Steinberg*, 419 U.S. 379, 391-392 (Burger, C.J., concurring).

C. The Instant Suit And The District Court's Decision

The suit here was brought by 22 coal mine operators against the Secretary of Labor and the Secretary of Health, Education and Welfare. Plaintiffs sought declaratory and injunctive relief from the operation of numerous portions of Title IV, alleging violation of their rights under the Fifth Amendment. A three-judge district court was convened pursuant to 28 U.S.C. 2282 and 2284. The court deferred consideration of the case until this Court had acted in *National Independent Coal Operator's, supra.* Then, upon cross-motions for summary judgment, the district court upheld most of the challenged statutory provisions, but ruled that "the irrebuttable presumption set forth in 30 U.S.C. 921(c)(3) and the limitation of evidence necessary to rebut the presumption created in 30 U.S.C. 921(c)(4) are violative of the United States Constitution" (J.S. 14A-15A).

1. Section 411(c)(3) of the Act, 30 U.S.C. (Supp. III) 921(c)(3), provides that "if a miner is suffering or suffered from a chronic dust disease of the lung," shown by x-rays, by a biopsy, or by similar techniques to be characterized by massive lesions of the lung, "then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis * * *." The district court concluded that this Section "not only involves a presumption of the existence of pneumoconiosis but forecloses all fact finding as to the effect of that disease upon a particular coal miner upon a clinical finding of the presence of a chronic dust disease" and "is a departure from the overall pattern of the Act which makes the existence of both the disease and disability two (2) separate factors which must be established before liability is imposed" (J.S. 9A). The court held (J.S. 10A):

> To the extent that such presumption purports to mak[e] a finding of total disability in terms other than those provided by the Act as standards for total disability, it is unreasonable and arbitrary. As written, section 921(c)(3) is violative of due process in precluding the opportunity to present evidence as to the effect of a chronic dust disease upon an individual in determining whether or not he is disabled.

2. Section 411(c)(4) of the Act, 30 U.S.C. (Supp. III) 921(c)(4), provides that if a miner employed for more than 15 years in underground coal mines is unable to submit evidence satisfactory under Sec-

tion 411(c)(3), but "other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment," then a rebuttable presumption arises that the disability is caused by pneumoconiosis. This presumption may be rebutted only by evidence that the miner does not have pneumoconiosis, or that his "impairment did not arise out of, or in connection with, employment in a coal mine."

The district court sustained the constitutionality of the presumption that respiratory impairments of long-time miners are pneumoconiosis, but held that the limitation upon the evidence that can be used to rebut the presumption is "invalid as arbitrary and unreasonable" (J.S. 11A). The court concluded that because pneumoconiosis is not disabling *per se*, "[t]o require rebuttal evidence that a coal miner did not have pneumoconiosis is irrational where liability is not predicated on the mere presence of the disease, but rather on a complicated state of the disease" [18] (*ibid.*). The court further held: "There is no rational basis upon which the burden of proving that the impairment 'did not arise out of, or in connection with employment in a coal mine' can be placed upon a specific potentially liable coal mine operator" (J.S. 12A; footnote omitted).

3. The government's motion to amend these two portions of the judgment was denied (J.S. 29A-30A). The government's motion for a stay pending appeal

[18] Contrary to the district court's apparent assumption, however, Section 411(c)(4), unlike Section 411(c)(3), is not restricted to "a complicated state of the disease."

(J.S. 18A-28A) also was denied by the district court (J.S. 32A-35A). On April 28, 1975, this Court stayed the portions of the district court's judgment that are adverse to the government.

4. The district court rejected the remaining arguments of the plaintiffs.[19] The court upheld the application of the Act to miners whose employment ended before 1969, pointing out that the Act requires compensation only if the miner can establish that he is afflicted with the disease and that it was caused by his earlier employment. It concluded that the Act is not unconstitutional merely because the gravity of the risk of pneumoconiosis "was unknown to the coal industry at large" at the time some of the covered miners were working for the coal operators (J.S. 5A). The court also concluded that the statutory definitions were rational, and that it could not "superimpose its judgment on that of Congress" (*ibid.*). "No meaningful argument has been presented challenging the power of Congress to make such defini-

[19] The court declined to consider the legality or constitutionality of the regulations promulgated by the Secretary of Labor pursuant to the Act, remanding these questions to the single district judge for disposition. Although the court's pendant jurisdiction would have enabled it to consider these allegations (*Santin Ramos* v. *Civil Service Commission*, 376 F. Supp. 361 (D. P.R.) (three-judge court) relying on *Hagans* v. *Lavine*, 415 U.S. 528), appeal on another ground pending, No. 74-216; *National Independent Coal Operator's, supra*), and although we believe the court should have done so in the interest of efficient judicial administration, we have not contested the remand order.

tion[s] after receiving conflicting medical evidence about the disease" (J.S. 6A).

SUMMARY OF ARGUMENT

I

Plaintiffs contend that Part C of the Act is unconstitutionally retroactive to the extent that it compels mine owners to compensate miners who left their employment prior to the effective date of the Act.

A. Under the Act's statute of limitations, claims must be made within three years after discovery of the disease. All claims filed within three and one-half years of the effective date of the Act, however, became the exclusive responsibility of the federal government, and mine operators are not required to pay them. Disability commencing prior to the effective date of the Act is thus a federal responsibility. Plaintiffs' "retroactivity" claim, therefore, pertains only to miners who ceased work prior to the effective date of the Act and became disabled after the effective date.

The Act's application to claims based on disability arising after the effective date of the Act is not "retroactive"; under settled principles of tort law an employment transaction is not considered "closed" until all injuries occurring or diseases contracted during the employment have come to light. Since plaintiffs are required to pay only for diseases that became disabling after the effective date of the Act, it does not impose a retroactive burden upon them.

Nevertheless, the Act has a limited retrospective effect, in the sense that it makes plaintiffs liable for the latent consequences of acts they performed in the past. This limited retrospective effect is not a reason to invalidate the Act. The power of government to enact a reasonable remedy for a public ill is not negated "merely because it has some retrospective operation" (*Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 315). "[T]here is no constitutional inhibition against retrospective laws. Though generally distrusted, they are often beneficial, and sometimes necessary" (*Blount* v. *Windley*, 95 U.S. 173, 180).

B. Plaintiffs reply that Congress should have imposed its retrospective burden by levying a tax on all mine operators rather than by compelling each mine operator to be individually responsible for the pneumoconiosis contracted by its ex-miners. This contention, of course, undercuts the force of plaintiffs' retroactivity argument, for it admits that Congress has the power to compel mine operators to compensate miners for disease caused by pre-Act employment. We see no difference of constitutional magnitude between achieving that end by levying a tax and achieving it by creating a system of individual mine owner responsibility. Although the system of individual responsibility may put some mine owners—those with a longer employment history and, consequently, proportionally more claims to pay—at a competitive disadvantage, Congress is not constitutionally required to enact the method of financing

plaintiffs consider the most fair. Indeed, a tax on all mine operators arguably would be unfair because it would force more recent entrants to "subsidize" the compensation costs of mine operators who have been producing coal (and pneumoconiosis) over a longer period and who have been deriving profit therefrom.

Congress, rather than the courts, is entitled to select between these possible legislative remedies for a discerned social evil. "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it" (*Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488).

II

Plaintiffs object as well to the provisions of the Act that establish the system of liability-determination for all claimants, even those who continued working after the effective date of the Act. Although they concede that Congress has the power to establish a system of workers' compensation for miners, they contend that the Act is irrational and arbitrary. These arguments are unpersuasive. The Act contains, to be sure, a number of provisions that establish presumptions: long term miners who have a respiratory disease are rebuttably presumed to have pneumoconiosis; other sections of the Act allow miners to collect benefits even though they are not functionally disabled. But these provisions are responsive to the problems of proving pneumoconiosis and to the

nature of the many types of respiratory ailment caused by coal dust; they are neither irrational nor arbitrary.

A. 1. The Act defines total disability in a way that allows a miner to recover benefits if he is unable to engage in the area of his residence in employment using skills similar to those he used in mining coal. This definition meets the needs generated by the disease itself, which leaves its victims debilitated rather than helpless, and which strikes a large proportion of people in sections of the country that offer little alternative employment. The definition is a reasonable response to the nature of the disease and the communities in which it occurs.

2. In any event, Congress could have provided that all miners afflicted with respiratory diseases shall be compensated, whether or not they are able to work. Many workers' compensation plans, several of them upheld by this Court, establish schedules of benefits for those who are disfigured or suffer other injuries not related to earning capacity. If Congress can provide compensation for physical injuries that do not affect earnings, it follows directly that it can provide benefits for those who have contracted pneumoconiosis, even before that disease has destroyed the miner's ability to engage in gainful employment.

3. The district court incorrectly struck down the rule of Section 411(c)(3), which provides that a miner with "complicated pneumoconiosis" is "irrebuttably presumed" to be totally disabled. The district court held that this rule is proscribed by this Court's "irrebuttable presumption" cases.

Although Section 411(c)(3) uses the words "irrebuttable presumption," it is not a "presumption" of any sort. Its effect is simply to provide that all miners with complicated pneumoconiosis shall be compensated. Congress was entitled to make a decision that miners suffering from complicated pneumoconiosis—the final and inevitably fatal phase of the disease—are entitled to compensation even while still able to work. In the context of the Act, denominating these miners as "totally disabled" achieved that result. Although it would have been less complicated if Congress had stated: "All miners with complicated pneumoconiosis shall be compensated," the Act is not the less constitutional for its circumlocutory draftsmanship.

Even if Section 411(c)(3) is properly considered an irrebuttable presumption, however, it still is constitutional. Under the analysis of *Weinberger* v. *Salfi*, No. 74-214, decided June 26, 1975, Congress is entitled to use irrebuttable presumptions as long as those presumptions are reasonable and do not burden fundamental personal rights. Because Section 411(c)(3) is concerned with ordinary economic relations in the private sector instead of with fundamental personal rights, it is within the power of Congress.

B. The evidentiary and medical presumptions do not produce a perfect "fit" between the rule and classical pneumoconiosis. Some miners who have respiratory diseases other than pneumoconiosis will

be able to use these presumptions to recover benefits. But Congress was faced with a dilemma: the medical evidence before Congress demonstrated that (a) medical tests for pneumoconiosis are not fully reliable, and x-rays (the most accurate test) have an error rate exceeding 25 percent; and (b) many coal miners suffer from respiratory diseases similar but not identical to pneumoconiosis and for which x-ray evidence is completely unreliable. Therefore, if Congress were to require all miners with respiratory diseases to prove by medical evidence that they are afflicted with pneumoconiosis, many miners with diseases caused by coal dust would be unable to qualify for benefits. On the other hand, if Congress were to allow every miner with a respiratory disease to recover benefits, many miners whose diseases did not arise out of their employment would receive benefits.

Congress struck a compromise. It established presumptions that long-term coal miners with respiratory diseases have pneumoconiosis. Congress allowed mine operators to rebut these presumptions, but provided that x-ray evidence alone would not be sufficient to dissipate the presumptions' force. On the other hand, those who were miners for less than ten years must prove not only that they are totally disabled, but also that their respiratory disease is pneumoconiosis. This compromise is a reasonable accommodation of the competing interests, and is not unconstitutional merely because it does not create perfect congruity between the classes of those who will be

able to recover and the classes of miners for whom Congress would provide coverage under an ideal system. As *Salfi* pointed out (slip op. at 30): "Not only does the * * * [legislative] approach thus obviate the necessity for large numbers of individualized determinations, but it also protects large numbers of claimants who satisfy the rule from the uncertainties and delays of administrative inquiry" into the full particulars of their disease.

ARGUMENT

Black lung disease exists in epidemic proportions among miners and ex-miners. There is good reason to believe that at least 500,000 miners have suffered or died from black lung in recent years, and that many more miners will be afflicted with the disease in the future.[20] In Title II of the Coal Mine Health and Safety Act of 1969, Congress prescribed standards for the exposure of miners to coal dust; if these standards are adhered to, the incidence of the disease in tomorrow's miners should be much lower. But Congress did not think it sufficient merely to decrease the future incidence of the disease; it also enacted provisions to benefit miners already afflicted or who will become afflicted.

For many years occupational accidents and diseases have been compensable under state and federal workers' compensation plans. Workers commonly receive compensation if they lose time from work because of

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[20] See page 6, *supra*; pages 24-25, *infra*.

such causes; they also are compensated for disfigurement or other injury, even if their earning capacity is not affected. And, of course, they receive compensation if the injury or illness reduces their earning capacity without eliminating it.

Those who suffered from black lung disease have not been so favorably treated. Lack of compensation for black lung was brought about by a combination of causes, the foremost being that only in the last 40 years has coal miners' pneumoconiosis been recognized as a disease distinct from silicosis, and the fact that black lung often does not become manifest until long after the afflicted miner has ceased inhaling the coal dust responsible for his condition.[21] Congress sought to rectify these problems in the Act and its 1972 amendments. The Act makes it clear that black lung is a distinct and compensable disease, and establishes a federal compensation program that corrects the deficiencies Congress discerned in state workers' compensation laws.[22]

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[21] See page 7, *supra*. See generally 1A Larson, *The Law of Workmen's Compensation* §§ 41.31, 41.80 (1973); Leg. His., *supra*, n. 9, at 680, 904-906.

[22] Congress possesses ample power under the Commerce Clause to establish a compensatory system of this sort, and plaintiffs do not contend otherwise. Section 4 of the Act, 30 U.S.C. 803, provides that the Act applies to "[e]ach coal mine, the products of which enter commerce, or * * * affect commerce * * *." This Court repeatedly has upheld Congress' power to regulate working conditions and benefits provided by private employers when the industries engage in commerce, even though the particular activities Congress regulates are not "in" interstate commerce. See, *e.g.*, *Katzenbach* v. *Mc-*

This program became effective on December 30, 1969. Congress was well aware, however, that because many miners with black lung had not previously been entitled to workers' compensation, there were large numbers of uncompensated miners and exminers who already were suffering from the disease and for whom compensation should be made available immediately. As the House Committee report pointed out, general imposition of liability on private industry for all cases of black lung that had become manifest prior to the Act's effective date would have been unwise and unfair.[23] Congress therefore provided that the federal government would assume full liability for all benefits to be paid to those who filed claims prior to January 1, 1972 (30 U.S.C. 924(a) and (b)). The 1972 amendments extended this period of federal responsibility to include full responsibility for all claims filed through June 30, 1972, and partial responsibility for claims filed before January 1, 1974 (Sections 414(a) and 415, 30 U.S.C. (Supp. III) 924(a) and 925).

The federal government has, through these provisions, assumed the responsibility for benefits to almost all of the miners in the United States who have, or have died from, black lung disease. During the

Clung, 379 U.S. 294, 303-304 (restaurant service); *United States* v. *Darby*, 312 U.S. 100 (Fair Labor Standards Act); *Southern Ry. Co.* v. *United States*, 222 U.S. 20 (Safety Appliance Act). Cf. *Perez* v. *United States*, 402 U.S. 146.

[23] H.R. Rep. No. 91-563, reprinted in Leg. His., *supra*, n. 9, at 571.

period from December 30, 1969, to June 30, 1973, when claims could be filed under the Part B program, approximately 550,000 individuals claimed federal benefits. Approximately 352,000 of these claims were approved, and an estimated 484,600 persons were adjudged entitled to receive federal benefits (A. 42; Fourth Annual Report, *supra*.) By the end of 1974, the Social Security Administration had paid some $3.2 billion in benefits and was continuing to pay benefits at an annual rate of $1 billion.[24]

The burden the Act places on mine operators has been light by comparison. Since July 1, 1973, approximately 70,000 claims have been filed with the Secretary of Labor. The Secretary informs us that he expects new claims to be filed at a yearly rate of approximately 5,000 to 6,000 beginning in the current fiscal year. Of the 70,000 claims filed under the transitional provisions (Section 415) and Part C, a substantial number were filed by miners whose Part B claims had been denied. For the most part, their claims were denied again. Moreover, many of the 70,000 claims have been denied because they were filed after the three-year statute of limitations had run. Others have been denied simply for lack of proof. All told, the Department of Labor has approved for payment only 21.6 percent of the transitional and Part C claims upon which it has made

[24] Hearings on H.R. 7, H.R. 8 and H.R. 3333 (Black Lung Benefits Reform Act of 1975) before the Subcommittee on Labor Standards of the House Committee on Education and Labor, 94th Cong., 1st Sess. 215, 219 (1975) (hereafter 1975 House Hearings).

decisions. The mine operators have sought administrative review in 97 percent of the cases in which the Secretary has approved the claim; the Benefits Review Board has reviewed 12 claims to date.[25]

The claims for which mine operators such as plaintiffs may be liable fall into three categories. First, there are claims of miners who ceased work in the mines prior to December 30, 1969, and whose disease became disabling prior to December 30, 1969. These are the cases that can accurately be classified as produced by a "retrospective" application of the Act. However, mine operators are liable for few, if any, claims in this category. All of these miners could have received federal compensation under Part B; if the miner or his survivors filed a claim before July 1, 1973, the federal government has assumed full liability. Moreover, under the Act's three-year statute of limitations, a miner whose disease became disabling prior to December 30, 1969, was required to file his claim by December 30, 1972—during a period when full responsibility for all claims was assumed by the federal government.[26] Unless there is some basis for tolling the applicable statute of limitations, or an administrative error is made in its application,

[25] See Department of Labor, First Annual Report on Administration of the Black Lung Benefits Act of 1972 During Calendar Year 1974 and the Transitional Period in the Second Half of 1973, p. 10 (1975); 1975 House Hearings, *supra*, n. 24, at 122-149.

[26] Section 422(f)(1), 30 U.S.C. (Supp. III) 932(f)(1).

all miners who both ceased work and were disabled by pneumoconiosis prior to the effective date of the Act will be compensated by the federal government or not at all. There is no realistic probability of "true" retroactivity facing plaintiffs.[27]

Second, the pneumoconiosis of some miners who left mine employment prior to the effective date of the Act became disabling after June 30, 1970. For all such miners, the statute of limitations is long enough for them (or their survivors) to make claims under Section 415 or Part C, and these claims become the responsibility of plaintiffs. Plaintiffs assert that the Act is unconstitutional to the extent it allows miners who quit mine employment prior to December 30, 1969, to receive benefits paid by mine operators. We answer these arguments in Point I, *infra*.

Finally, some miners who were working in the mines on the effective date of the Act now have contracted pneumoconiosis. Plaintiffs concede that, in principle, Congress has the constitutional power to compel them to provide benefits to such miners. They argue, however, that the Act contains irrational and overbroad definitions and presumptions. We answer these arguments in Point II, *infra*.

[27] Under the regulations of the Department of Labor, however, mine operators are liable for the medical benefits of these "Part B" claimants, and could contend that the Act is retroactive to that extent. However, the district court did not pass upon the validity of the Secretary's regulations, and the question of the statutory authorization, or constitutionality, of those regulations is not before this Court.

I. CONGRESS IS CONSTITUTIONALLY EMPOWERED TO REQUIRE OPERATORS TO BE FINANCIALLY RESPONSIBLE FOR BLACK LUNG DISEASE CONTRACTED BEFORE 1969 BUT NOT MANIFEST UNTIL AFTER THE ACT'S PASSAGE

Plaintiffs' assault upon the "retroactive" application of the Act has two components. They argue that Congress lacks power to compel them to compensate those who left the mines prior to the effective date of the Act, and that even if Congress has such power, the power should be exercised by levying a tax on "the industry," rather than by imposing liability upon individual operators. We answer these arguments in turn.

A. The Limited Retrospective Operation Of Part C Is Constitutionally Permissible

Plaintiffs contend that Part C is unconstitutionally retroactive because it imposes new liability upon mine operators on the basis of mine employment completed prior to the effective date of the Act. We submit, to the contrary, that Part C is not retroactive, let alone unconstitutionally retroactive. The events that fix liability in the mine operators occur after the effective date of the Act; miners whose pneumoconiosis was discovered before 1970 are paid by the federal government.

Under settled principles of tort law, the date upon which liability for an injury or disease is fixed is the date upon which the injury becomes manifest. See American Law Institute, *Restatement (Second) of Torts* § 433(c), comment f (1965). The period of

"dealings" between a mine owner and its employee is not "closed" until the transactions between them have produced their full complement of physical effects. Indeed, it is hornbook law that an employment transaction is not considered "terminated" until any injuries and occupational diseases incurred or contracted during the employment have come to light. See 1A Larson, *The Law of Workmen's Compensation* § 41.80 (1973); 3 Larson, *supra*, at § 78.41 (1973) (collecting cases). The principle is the same when the employment relationship produces a festering disease rather than a concealed injury; plaintiffs cannot, by unilaterally "closing their books" on the employment transactions with their past employees, immunize themselves from legislative imposition of liability for injury that becomes manifest at some later date. The proper date for retroactivity analysis is the date upon which a miner's black lung disease is discovered. Because the Act's statute of limitations is three years, and because the federal government assumed in Part B full responsibility for all claims filed in the first three and one half years of the Act's operation, plaintiffs and other mine operators are not being called upon to pay claims for miners whose pneumoconiosis became disabling before the Act's effectiveness.[28] The Act is, therefore, not retroactive in the proper sense.

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[28] The Department of Labor has taken the position that the statute of limitations does not apply to claims made during the Section 415 transitional period. However, the transitional period did not begin until three and one-half years after the Act became effective, and is unlikely to result in a significant

We do not dispute, however, that the Act has some retrospective effect, in the sense that many of the transactions that gave rise to a miner's black lung disease preceded the passage of the Act. But the power of government to enact a reasonable remedy for a public ill is not negated "merely because it has some retrospective operation." *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 315. If the public need is great, and the retrospective effect reasonable in relation to that need, the power of Congress prevails over the expectations of private corporations. See *Campbell* v. *Holt*, 115 U.S. 620, in which, as was the case in *Chase Securities Corp.*, the Court upheld state laws extending statutes of limitations, even though the extensions revived liability for transactions that some had regarded as long closed. The Constitution does not diminish the power of Congress to make laws for the public welfare simply because those laws may affect transactions that some parties consider "closed". See *Curtis* v. *Whitney*, 13 Wall. 68, 70 ("That a statute is not void because it is retrospective has been repeatedly held by this court, * * *"); *Ferguson* v. *Skrupa*, 372 U.S. 726; *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398; *Blount* v. *Windley*, 95 U.S. 173, 180 ("[T]here is no constitutional inhibition against retrospective laws. Though generally distrusted, they are often beneficial, and

number of claims that are properly classified as retroactive. If and when such claims arise, the question of retroactivity and of the applicability of the statute of limitations can be litigated.

sometimes necessary"). There are many other cases in which the Court has sustained legislation retrospectively creating liability or extinguishing expectations. We set forth in the margin but a few of them.[29]

Plaintiffs rely upon a single case—*Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330—to blunt the force of this long line of cases upholding legislation with retrospective effects. Even if *Alton* can be considered good law in light of the many later (and earlier) cases of contrary purport, it does not offer much support to plaintiffs. The district court correctly distinguished it (J.S. 4A-5A). *Alton* dealt neither with a person whose disease was discovered after the enactment of remedial legislation, nor with personal injuries or illnesses of any sort, but with purely economic interests (retirement and pension plans) of employees whose employment relationship already had been terminated. Retirement plans are

[29] See *Lichter* v. *United States*, 334 U.S. 742 (legislation requiring renegotiation of war contracts to recapture excessive profits); *Fleming* v. *Rhodes*, 331 U.S. 100 (retroactive effect of price control legislation upon leases); *Norman* v. *Baltimore & Ohio R. Co.*, 294 U.S. 240 (legislation invalidating contract clauses requiring obligor to repay indebtedness in gold); *Philadelphia, Baltimore & Washington R.R.* v. *Schubert*, 224 U.S. 603 (invalidating contractual avoidance of liability under Employers' Liability Act of 1908); *Louisville & Nashville R.R.* v. *Mottley*, 219 U.S. 467 (legislation prohibiting use of free passes previously extended in settlement of lawsuit).

See generally Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 Calif. L. Rev. 216 (1960); Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960).

the equivalent of deferred salary, and the law in *Alton* therefore can be regarded as a legislative attempt to compel employers to increase the salary of their employees after the work had been completed. Workers' compensation plans perform an altogether different function by compelling employers to make employees whole for injuries done to them; the Act gives nothing to a miner who does not suffer or die from pneumoconiosis.

B. Congress Is Empowered To Require Each Mine Operator To Bear The Costs Of Black Lung Of Its Ex-Miners, Rather Than To Impose The Costs On "The Industry" As A Whole

Plaintiffs attempt to draw an analogy to recent decisions under the Due Process and Equal Protection Clauses and seek strict scrutiny of the Act, to the extent it places heavier burdens on some mine operators than others. They argue that the Act's method of allocating costs—each operator must pay the benefits due to miners who used to work in its mines—will place some mine owners at a competitive disadvantage to other mine owners who have fewer ex-miners eligible for black lung benefits. Plaintiffs suggest that Congress should have imposed an industry-wide tax to create a fund out of which to pay black lung benefits; this tax, they suggest, would avoid the inequities of individual mine owner liability.

This argument seriously undermines plaintiffs' contention that Congress is without power to compel mine operators to bear retrospective liability for the pneumoconiosis of miners who ceased work before 1970. If Congress levied such a tax, it would take

the property of mine operators in order to compensate miners, the very "flaw" in Part C of which plaintiffs complain. If Congress has the constitutional power to compel mine operators to compensate their ex-miners, Congress should be able to exercise that power by establishing a system of individual responsibility no less than by establishing a system of collective responsibility operating through a tax. The cost of either program would be approximately the same, and would fall on the same group of companies.

While thus apparently conceding that Congress can compel mine operators to compensate ex-miners, plaintiffs argue merely that the method Congress chose is less "fair" to some mine operators than is an alternative method. They point out that the Act may place mine operators with many disabled ex-employees at a competitive disadvantage to mine operators with fewer disabled ex-employees. However, if Congress had adopted plaintiffs' suggestion and imposed a tax on all mine operators, recent entrants into the mining business could then have complained that it would be "unfair" to tax them in order to provide benefiits to miners they never employed, in order to recompense the miners for disease they never caused.

Plaintiffs' argument that the Act is "unfair" to mine operators that are responsible for more black lung disease than their competitors does not approach the claim of "invidious discrimination" necessary successfully to attack a social welfare measure dealing with corporations. *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359. This Court has

afforded legislatures wide latitude in fixing the obligations owed by employers to their employees (*United States* v. *Darby*, *supra*; *Nebbia* v. *New York*, 291 U.S. 502), and the employer must do more than simply claim that the legislation is "unfair" in some particulars. "The day is gone when this Court uses the Due Process Clause * * * to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488. See also *Ferguson* v. *Skrupa*, 372 U.S. 726; *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421. "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it" (*Williamson*, *supra*, 348 U.S. at 488). Even if an Act "exact[s] a needless, wasteful requirement in many cases * * * it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement" (*id.* at 487).

The Act meets the test established by this Court. There is "an evil at hand for correction" and "it might be thought that" individual mine operator liability "was a rational way to correct it." Plaintiffs' argument that a better way could have been devised is not material; it is no more than a legislative argument. There is nothing inherently irrational in the decision of Congress that firms that have been producing coal (and pneumoconiosis) for a longer period, and profiting therefrom, should bear more of

the cost of the program than do more recent entrants into the industry.

The principles of cases such as *Williamson* have not, as plaintiffs contend, been discarded by this Court. The cases plaintiffs cite for this proposition (Br. 31-32, 60-63) pertain, as the Court recently made clear, only to legislation touching upon fundamental personal rights. See *Weinberger* v. *Salfi*, No. 74-214, decided June 26, 1975, slip op. 16-20, 33. For legislation touching on ordinary business decisions and interests, however, *Williamson* still states the governing rule, a rule permitting wide "latitude to legislate decisions regulating the private sector of the economy" (*Salfi*, *supra*, slip op. at 22). See also *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156; *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356.

Accordingly, Congress was constitutionally entitled to require mine operators to bear liability in proportion to the number of their miners that have succumbed to pneumoconiosis, as this Court held in *National Independent Coal Operator's*, *supra*.[39]

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[39] Plaintiffs have argued (Motion to Affirm in No. 74-1302, at 8-10) that *National Independent Coal Operator's* "was not even brought to challenge the constitutionality of Title IV" and, consequently, that this Court's summary affirmance is "inapplicab[le]" (*id.* at 8, 10). But the complaint in that case clearly challenged the constitutionality of Title IV, making the same contentions appellants now make (see par. 20 of the *NIOCA* complaint, reprinted at *id.*, p. 9). NIOCA's jurisdictional statement was addressed almost entirely to constitutional claims, which plaintiffs have repeated. We submit, therefore, that this Court's summary affirmance in that case is dispositive of many issues in this case.

II. THE COMBINATION OF DEFINITIONS AND PRESUMPTIONS CONTAINED IN TITLE IV IS A PERMISSIBLE LEGISLATIVE SOLUTION OF THE PROBLEM OF DETERMINING WHO SHOULD BE COMPENSATED

Whether or not plaintiffs' arguments against the application of Part C to miners who left employment prior to 1970 are accepted by this Court, plaintiffs will continue to be required to compensate miners who left their employment or died from the disease in 1970 or thereafter. Although they concede that Congress has the power, consistent with the Constitution, to establish a program of workers' compensation for miners who suffer or die from black lung disease, they contend that many of the features of Title IV are unconstitutional. They seek, in essence, an order from this Court instructing Congress to start over again and devise what would be, from their point of view, a "better" workers' compensation program. But Congress is not constitutionally required to tailor its workers' compensation programs to plaintiffs' conception of the good, and Title IV, we submit, is consistent with the Constitution.

Coal miners' pneumoconiosis is a disease that afflicts many coal miners who have inhaled substantial quantities of mine dust. Some symptoms of black lung appear in a substantial proportion—perhaps more than half—of all long term coal miners.[31] Although the disease is widely prevalent among miners, many of its symptoms are similar to the

[31] See page 6, *supra*.

symptoms of other respiratory diseases related to coal dust inhalation, and even sophisticated tests sometimes are unable to provide a clearcut diagnosis or ascertain the cause of the disease.[32] Based on the extensive medical evidence it has received, Congress decided to alleviate the problems of proof in individual cases by adopting a series of definitions and presumptions, based on Congress' understanding of the nature of pneumoconiosis and related diseases and reflecting the medical probability that if a coal miner who has worked many years in the mines develops a respiratory disease, that disease most likely is pneumoconiosis.

The statutory provisions interlock. Any miner who can prove that his ailment is "complicated pneumoconiosis"—the last and terminal stage of the disease—is "irrebuttably presumed" to be totally disabled and consequently is entitled to benefits whether or not he is physically unable to work (Section 411 (c)(3)). A miner with a less-advanced stage of the disease is subjected to a different set of presumptions and requirements of proof. First, the miner bears the burden of proving that he is "totally disabled," a term defined by statute (Section 402(f)) and regulation (20 C.F.R. 410.412(a)(1)) as inability to engage, in the area of the miner's residence, in work requiring skills similar to those he employed when able to work as a miner.

Second, once a miner has proved that he is "totally disabled" and is afflicted with a respiratory ailment,

[32] See pages 49-55, *infra*.

he is entitled to the benefit of three rebuttable presumptions if and only if he has worked as a miner for a lengthy period. (a) If a miner who has worked in the mines for ten years or more contracts pneumoconiosis, there is a rebuttable presumption that the pneumoconiosis arose out of his employment (Section 411(c)(1)). The mine operator can rebut this presumption by adducing evidence that the individual was not exposed to coal dust that might have caused the disease (Section 422(c)). (b) If a miner dies of a respiratory disease after working ten or more years in the mines, there is a rebuttable presumption that his death was caused by pneumoconiosis (Section 411(c)(2)). The mine operator can rebut this presumption by demonstrating that dust conditions in his mine could not have caused pneumoconiosis or by demonstrating that the proper diagnosis of the miner's disease was other than pneumoconiosis. The mine operator cannot rely upon x-ray evidence alone to discharge this burden (Section 413(b)). (c) If a miner dies after working 15 or more years in the mines, but x-ray or other available evidence shows that he did not have complicated pneumoconiosis, there is nevertheless a presumption that his death was due to pneumoconiosis if his survivors can prove that he had a totally disabling respiratory disease. The mine operator can rebut the presumption by proving that the disease was not pneumoconiosis or did not arise out of mine employment (Section 411(c)(4); Section 422(c)); x-ray evidence is not by itself sufficient to discharge this burden of refutation (Section 413(b)).

The nub of plaintiffs' claim is that these presumptions are hard to rebut, particularly because of the limited usefulness of x-ray evidence; in consequence, plaintiffs argue, some non-disabled miners who had respiratory diseases other than classical pneumoconiosis (or not arising out of mine employment) will be entitled to receive benefits. All of this is true, but it does not, we submit, establish that the Act is unconstitutional. Acting upon the evidence before it, Congress was entitled to conclude that it had two basic alternatives. It could establish a system of definitions and presumptions that would make it relatively simple for miners with respiratory diseases caused by mine employment to recover; in that event some who were not victims of classical pneumoconiosis would nevertheless receive benefits. Congress alternatively could require each miner with a respiratory disease to prove that the disease was black lung rather than something else; in that event many victims of that disease would fail in their proof and be denied benefits. Because black lung is difficult both to prove and to disprove, neither alternative would enable Congress to make a "perfect fit" between its categories and those who "deserve" benefits; between the possible approaches—one making it difficult for miners to prove that their respiratory disease was pneumoconiosis, and the other making it difficult for mine operators to prove that the disease was not pneumoconiosis—Congress was entitled to choose the former.

> [T]he question [is not] whether the provision filters out a substantial part of the class which caused congressional concern, or whether it filters out more members of the class than nonmembers. The question is whether Congress, its concern having been reasonably aroused * * *, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule. * * *
>
> * * * * *
>
> There is thus no basis for our requiring individualized determinations when Congress can rationally conclude not only that generalized rules are appropriate to its purposes and concerns, but also that the difficulties of individual determinations outweigh the marginal increments in the precise effectuation of congressional concern which they might be expected to produce.

Weinberger v. *Salfi*, *supra*, slip op. at 25, 33.

A. The Act's Definition Of "Total Disability" Is Constitutional

1. The definition of "total disability" is reasonable

Section 402(f), 30 U.S.C. (Supp. III) 902(f), defines "total disability" as the miner's inability to engage "in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time." Plaintiffs argue (Br. 57-59) that this definition is arbitrary and irrational, noting that it was opposed by representatives of the Departments of Health, Education, and Welfare and Labor, who preferred the more restrictive definition in the 1969 Act. Plaintiffs' challenge apparently is based upon their view that the definition is unwise; they do not argue that Congress is without power to provide compensation to anyone not disabled in a more usual sense.

Congress had strong reasons for rejecting the traditional definition here; it was well aware that coal miners whose health is broken by pneumoconiosis are for all practical purposes, unemployable. Thus, Senator Byrd stated (Hearings on S. 2675, S. 2289 and H.R. 9212 (Black Lung Legislation, 1971-1972) before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 1st and 2d Sess. 210 (1972)):

> Some of our colleagues may feel that the coal miner must meet the same disability criteria applied to workers in other occupations, but in all justice, I believe we must take recognition of the uniquely severe conditions under which the coal miner has labored and of the fact that once incapacitated for this work at mid-point or near the end of his working life, he is not retrainable as are individuals who have worked in other occupations.
>
> He usually is not educated for work requiring sophisticated mental skills; and he will not be up to any job requiring even ordinary physical exertion.

> Furthermore, in the region of the coal mines there are few if any other jobs in which he might be employed.
>
> We cannot expect a man so spent in body and spirit to pull up stakes and relocate.

In light of these considerations, Congress adopted a less restrictive definition of total disability than that contained in the Social Security Act. The Senate Report explains (S. Rep. No. 92-743, 92d Cong., 2d Sess. 16-17 (1972)):

> The Committee makes no judgment on whether the test in Title II of the Social Security Act, "inability to engage in any substantial gainful activity," is an appropriate definition of application to the total universe of workers in the Nation. But, it is unrealistic when applied to coal miners, if it results in the denial of claims of miners who for medical reasons can no longer be expected to work in the mines and for whom there is no, too often, other realistic employment opportunity, or for whom the only opportunity for employment may be at wages far less than they would have earned had they been able to continue to work in their usual jobs.

The legislative power to define a compensable condition in terms that reflect an evaluation of economic, medical, and social evils the legislature seeks to remedy is settled. *Geduldig* v. *Aiello*, 417 U.S. 484, 494-495. The definition of "total disability" adopted by Congress reflects just such a policy choice, based upon a rational understanding of the economic realities facing coal miners afflicted with pneumoconiosis.

2. Congress is empowered to establish compensation programs for injured miners, whether or not they are disabled

Plaintiffs' argument against the Act's definition of "total disability" appears to rest in large measure upon the unstated assumption that if a miner is able to work at some job, Congress lacks the power to provide for his compensation. That assumption is erroneous. Congress has the power to establish programs requiring private employers to pay their employees compensation for disability that is less than total. Accordingly, the Act is not unconstitutional merely because it requires the plaintiffs to compensate miners who are not physically prevented from performing all work.

Most workers' compensation programs, including the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1427-1428, as amended, 33 U.S.C. 908(c), include what are usually called "scheduled benefits." If an employee suffers a physical injury that does not make him unemployable, he receives compensation, in a fixed amount, to recompense him for that injury. Section 908(c) establishes scheduled payments for numerous injuries, including loss of a finger, partial blindness, and so on. Specified benefits are payable for each injury whether or not the injury affects the employee's ability to work or his wage earning capacity. Congress' determination that miners who have pneumoconiosis should be compensated even if only partially disabled by the disease is supported by similar reasoning.

Indeed, this Court has upheld the constitutionality of workers' compensation provisions that provide benefits based upon a medical condition rather than upon current inability to work. *New York Central R.R. Co.* v. *Bianc*, 250 U.S. 596, sustained a New York statute conferring benefits upon employees who suffered an employment-related facial disfigurement but no loss of ability to work. See also *Arizona Employers' Liability Cases*, 250 U.S. 400, 433 (opinion of the Court; Holmes, J., concurring). And in *Urie* v. *Thompson*, 337 U.S. 163, 181-187, the Court held that occupational diseases are compensable as "injuries" under the Federal Employers' Liability Act whenever the disease "impairs or destroys an employee's health" (*id.* at 186). The Court intimated no doubt about the constitutionality of compensation for diseases that impair health but do not reduce earning capacity. *A fortiori*, Congress has the power to require plaintiffs here to compensate miners with pneumoconiosis, whether or not that disease has destroyed the miner's capacity to engage in all gainful employment.

3. *The conferral of benefits in Section 411(c)(3) on all miners with complicated pneumoconiosis is constitutional*

Section 411(c)(3) provides that any miner who can prove by competent medical evidence that he is afflicted with "complicated pneumoconiosis," the final and terminal stage of black lung disease,[33] is "ir-

[33] Dr. William H. Stewart, Surgeon General of the United States, testified: "In its advanced form, it [pneumoconiosis] leads to severe disability and premature death." 1969 Senate Hearings, *supra*, n. 3, at 719. Similarly, Dr. Leon Cander, Chairman of the Department of Medicine of the University of Texas Medical School, an acknowledged expert in pulmonary medicine, testified:

> Once progressive massive fibrosis develops, there is no way to prevent its relentless progress. If you remove the miner from the mine, it does not matter; the disease progresses.
>
> * * * * *
>
> Patients with progressive massive fibrosis, however, usually die of either pulmonary insufficiency or heart failure caused by pulmonary disease. [*Id.* at 858.]

As Congressman Dent noted, "when the victim reaches the fourth stage, known as progressive massive fibrosis or complicated pneumoconiosis * * * he has a fatal, uncurable and irreversible disease. At that time he is destined to die from the disease." Leg. His., *supra*, n. 9, at 693.

rebuttably presumed" to be "totally disabled due to pneumoconiosis" within the meaning of the Act. Because all "totally disabled" miners are entitled to benefits, the effect of Section 411(c)(3) is to provide that all miners with complicated pneumoconiosis are entitled to benefits. Plaintiffs assert, and the district court held, that Section 411(c)(3) is unconstitutional because it establishes an "irrebuttable presumption." We submit, to the contrary, that Section 411(c)(3), although cast in terms of a "presumption," establishes a reasonable rule of liability well within the power of Congress. And, even if viewed as an "irrebuttable presuption," Section 411(c)(3) still is constitutional.

a. *Section 411(c)(3) establishes a rule of entitlement to benefits rather than an "irrebuttable presumption" of physical disability*

The district court's characterization of Section 411 (c)(3) as an irrebuttable presumption that, in fact, miners with complicated pneumoconiosis are "totally disabled" and *therefore* entitled to compensation, is inaccurate. Although Section 411(c)(3) uses the words "irrebuttable presumption," it does not create a presumption of any sort. Congress has done no more than to provide that all miners with complicated pneumoconiosis, a terminal and irreversible disease, are to be compensated whether or not they are able to work.

The irrebuttable presumption cases, as this Court discussed them in *Salfi*, *supra* (slip op. at 19-25, 29-33), fit a single pattern: the legislature has created a prophylactic rule. A legislature, in order to address fact B (in *Salfi*, sham marriages), irrebuttably infers fact B from fact A (in *Salfi*, short duration of marriage). In all cases of this sort there is some lack of congruity between the presence of fact A and the presence of Fact B. The legislative classification will bear harshly on persons who have fact A, but do not have fact B. Such a legislative classification will be evaluated by the courts to determine whether there is sufficient congruity between A and B—and sufficient difficulty in proving B directly—to support the decision of the legislature to use the prophylactic rule in order to reduce the economic and social costs of administering the program. Although inferrring B

from A will work to the disadvantage of some persons, requiring the government to prove B directly might be very costly and work to the disadvantage of others.

Section 411(c)(3) does not fit this pattern. Congress, in order to address fact A (complicated pneumoconiosis), has provided that any miner who can prove fact A is entitled to recover. Since, as we have demonstrated above (pages 43-44, *supra*), Congress has authority to require employers to compensate employees who have diseases that are not disabling, it follows that Congress can require employers to compensate miners who have complicated pneumoconiosis, whether or not the complicated pneumoconiosis prevents them from working.

In short, Section 411(c)(3) is not a legislative determination that, contrary to fact, all (or even some) miners afflicted with complicated pneumoconiosis are unable to work. It expresses instead a decision by Congress that all miners with complicated pneumoconiosis should be compensated. In the context of the Act, denominating these miners as "totally disabled" produces that result. Although it surely would have been less complicated if Congress had stated: "All miners with complicated pneumoconiosis shall be compensated," the Act is not the less constitutional for its circumlocutory draftsmanship. Congress' choice of language does not affect its constitutional power to provide for compensation of miners with complicated pneumoconiosis; unless it lacks such power, Section 411(c)(3) should be sus-

tained. The validity of the exercise of legislative power does not depend upon the form of words Congress used to make the result come about."[34]

b. *Even viewed as an "irrebuttable presumption," Section 411(c)(3) is constitutional*

The Court thoroughly re-examined the "irrebuttable presumption" cases only a few months ago in *Salfi*. It identified the dispositive factor differentiating those irrebuttable presumptions that it had held unconstitutional from those it had not: the unconstitutional irrebuttable presumptions involved legislative decisions touching on suspect categories or fundamental rights.[35] *Salfi*, *supra*, slip op. at 16-20, 33. The Court referred to, and approved, decisions upholding irrebuttable legislative presumptions affecting only the private sector of the economy (*id.* at 20-25). Section 411(c)(3) affects only the private sector of the economy, and does not affect any fundamental personal right of plaintiffs. Under the analysis used

[34] This principle, of course, works both ways. For Congress to call something an "irrebuttable presumption" no more makes it one (within the meaning of this Court's cases) than calling it a "definition" or a "rule of liability" takes it outside the reach of those cases (if the legislation in fact provides that one fact shall be inferred from proof of another).

[35] See generally Simson, *The Conclusive Presumption Cases: The Search for a Newer Equal Protection Continues*, 24 Catholic U. L. Rev. 217, 228-223 (1975); McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 Sup. Ct. Rev. 34; Comment, *Fundamental Personal Rights: Another Approach to Equal Protection*, 40 U. Chi. L. Rev. 807 (1973).

in *Salfi*, therefore, Section 411(c)(3) is constitutional even if it is viewed as an "irrebuttable presumption." "Congress could rationally have concluded that any imprecision from which [Section 411(c)(3)] might suffer was justified by its ease and certainty of operation" (*id.* at 28).

B. The Evidentiary Rules And Medical Presumptions Of The Act Are Reasonable

We have described in detail (pp. 37-38, *supra*) the medical presumptions and limitations upon rebuttal evidence contained in the Act. Plaintiffs complain that because there is not a perfect fit between these presumptions and the incidence of classical pneumoconiosis, they will be required to compensate some miners whose respiratory disease may not, in fact, be classical pneumoconiosis (and, therefore, may not have arisen out of mine employment). But here, as in *Salfi*, *supra*, slip op. at 30: "Not only does the * * * [legislative] approach thus obviate the necessity for large numbers of individualized determinations, but it also protects large numbers of claimants who satisfy the rule from the uncertainties and delays of administrative inquiry" into the full particulars of their disease. Congress had before it abundant evidence from which it was entitled to conclude that, without such presumptions and limitations upon rebuttal evidence, many deserving miners with respiratory diseases caused by their employment would be unable to recover (see pp. 50-55, *infra*). The evidence to this effect was so great that, we submit, it

would have been constitutional for Congress to provide that *all* miners and ex-miners, no matter how short of duration of their mine employment, would be entitled to receive compensation for every respiratory disease.[36] Congress did not go that far, and plaintiffs are hardly in a position to complain that Congress provided them with rebuttal opportunities when the Constitution does not require it to do so, and that it limited the Act's medical presumptions to miners who had been employed in the mines for ten years or more.

In any event, as we shall now show in some detail, the presumptions and limitations at issue were a proper legislative response to the evidence that was before Congress.

1. *The limitations upon the use of medical evidence are supported by the nature of the disease and the limited reliability of x-ray diagnosis*

Plaintiffs' objection to the medical presumptions is grounded in the limitation on the use of medical evidence contained in Section 413(b) (30 U.S.C. (Supp. III) 923(b)). The important feature of Section 413 (b) is its direction to the Secretary of Labor that "no claim for benefits * * * shall be denied solely on the basis of the results of a chest roentgenogram." [37]

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[36] See S. Rep. No. 92-743, 92d Cong., 2d Sess. 10 (1972), establishing that coal miners are far more susceptible than the general population to respiratory diseases of all sorts.

[37] Section 413(b) further provides that "all relevant evidence shall be considered, including" blood gas studies, x-ray results, pulmonary function studies, electrocardiograms, physical performance tests, and affidavits of a physician and the miner's wife. Section 411(c)(4) provides that a wife's

Plaintiffs contend that, unless chest x-rays standing by themselves can negate a claim for benefits, many miners who have respiratory diseases other than classical pneumoconiosis will qualify for benefits. This, like many of plaintiffs' other arguments, however, is a complaint about the wisdom of Congress' policy choices, not about its constitutional power to make them.

Prior to the passage of the Act in 1969, several physicians with experience in pneumoconiosis diagnosis and treatment urged Congress to prohibit denial of claims solely on the basis of a negative x-ray.[38] However, the 1969 Act directed the Public Health Service, the National Institutes of Health, and the Social Security Administration to develop diagnostic tests for pneumoconiosis.[39] Congress neither approved nor disapproved full reliance on x-rays.

The Social Security Administration devised evaluatory criteria based almost entirely upon x-ray findings. The legislative history of the Black Lung Benefits Act of 1972 shows that Congress was not satisfied with these criteria. The hearings conducted by Congress in contemplation of the 1972 amendments revealed that (1) autopsy evidence indicated a 25 percent error in diagnosis where claims evaluation

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affidavit, standing alone, is not sufficient medical evidence to qualify for benefits.

[38] 1969 Senate Hearings, *supra*, n. 3, Part 2, at 660-664, 693, 1028.

[39] *Id.* at 664.

was made on x-ray findings alone;[40] (2) current medical knowledge supported the conclusion that cardio-pulmonary conditions other than classical pneumoconiosis, and which are not diagnosable by x-ray, are associated with dust exposure in the coal mines,[41] and (3) that coal miners are subject to such respiratory diseases at a rate far in excess of the general population.[42] Congress therefore determined that complete reliance upon x-rays as a means of disproving pneumoconiosis would deny benefits to many miners afflicted with respiratory diseases arising out of coal mine employment.

The Senate Report on the 1972 Amendments observed:[43]

> The art of medical diagnosis of coal miners' respiratory impairments is not so precise that a miner's benefit should stand or fall on the basis of a single test. Every available medical tool should be used to assist a miner in successfully pursuing his claim for benefits. * * *
>
> * * * * *
>
> The mine environment produces a variety of hazards to the miner's health. Not only is he exposed to coal dust, but also sand and rock dust containing harmful amounts of silica, fine

[40] S. Rep. No. 92-743, *supra*, n. 36, at 9-16; H.R. Rep. No. 92-460, 92d Cong., 1st Sess. 8-10 (1971); H.R. Conf. Rep. No. 92-1048, 92d Cong., 2d Sess. 9 (1972).

[41] *Ibid.*

[42] *Ibid.*

[43] S. Rep. No. 92-743, *supra*, n. 36, at 15, 16.

> enough to reach the innermost portions of the lungs. Few miners have not experienced repeated respiratory insults associated with the inhalation of fumes from cable fires, blasting, or burning hydraulic fluid. * * *

In short, Congress properly concluded that there was an unacceptable rate of diagnostic error associated with x-rays, and its decision not to permit sole reliance on negative x-rays is supported by the uncontradicted evidence before it.[44]

2. *The presumptions arising from long duration of employment are rationally based*

Plaintiffs' suggestion that the duration of employment provisions should be struck down because they are irrational is baseless. Although it is true that pneumoconiosis develops because of exposure to coal dust, and that a miner who works longer in a less dusty environment may not be exposed to as much dust as a miner who works for a shorter period of time in a dustier environment, this does not undermine the presumptions in Section 411 that are triggered by a lengthy period of mine employment. Since it is impossible to ascertain the amount of dust to which a miner has been exposed, it was reasonable for Congress to substitute a closely related

[44] See also 117 Cong. Rec. 40428-40458 (1971).

factor that is readily ascertainable—length of employment.[45]

This legislative determination is strongly supported by medical evidence before Congress that pneumoconiosis does not become prevalent among miners until they have worked at least ten years in the mines.[46] And, in referring to the use of a fifteen-year presumption, the Senate Report noted[47] that "[t]he fifteen year period * * * merely reflects the testimony of the Surgeon General in 1969, who stated:

> 'For work periods less than 15 years underground, the occurrence of pneumoconiosis among miners appears to be spotty and shows no particular trend. For work periods greater than 15 years underground, there was a linear increase in the prevalence of the disease with years spent underground.' "

Plaintiffs' argument that there is no rational basis for the presumptions triggered by duration of employment is, therefore, unavailing. *Weinberger* v. *Salfi, supra; Ferguson* v. *Skrupa, supra; Williamson* v. *Lee Optical Co., supra.* An evidentiary presumption exceeds the power of Congress only if the presumption is a "purely arbitrary mandate" (*Mobile, Jackson & Kansas City R.R.* v. *Turnipseed*, 219

[45] Pneumoconiosis is related to the number of years of employment in the mines. 1969 Senate Hearings, *supra*, n. 3, Part 2, at 634-637, 658-659, 720, 757-765.

[46] *Id.* at 699, 742. Cf. *id.* at 641; *id.*, Part 3 at A91-A96.

[47] S. Rep. No. 92-743, *supra*, n. 36, at 13.

U.S. 35, 43). The presumptions of Section 411 are not "purely arbitrary." [48]

3. *The district court improperly invalidated the limitations on evidence contained in Section 411 (c)(4)*

Section 411(c)(4) of the Act provides that a miner employed for 15 years or more in a coal mine, but unable to prove that he has complicated pneumoconiosis, is rebuttably presumed to be (or, if deceased, to have been) totally disabled because of pneumoconiosis, if he can present evidence of a totally disabling respiratory or plumonary impairment. Unlike Section 411(c)(3), which creates a rule of substantive law, this section creates an evidentiary presumption in cases where a miner cannot demonstrate that his pneumoconiosis has reached the progressive or complicated state. The miner (or the Secretary in his stead) must prove lengthy employment, the presence of a respiratory disease, and total disability. A presumption then arises that the disease is pneumoconiosis. The section then provides that this presumption can be rebutted "only" by evidence that the miner did not have pneumoconiosis or that the im-

[48] Plaintiffs rely upon cases such as *Levy* v. *United States*, 395 U.S. 6, to support their argument that the Act's rules and presumptions are not sufficiently rational. But *Leary* was a criminal case, and in order to support a verdict of guilt a presumption must be accurate in the individual case as well as rationally supportable as applied to the class of cases. See *Barnes* v. *United States*, 412 U.S. 837; *Turner* v. *United States*, 396 U.S. 398. The legislature has far broader discretion in drawing inferences and establishing classifications in economic regulatory legislation. See *Weinberger* v. *Salfi, supra.*

pairment did not arise out of employment in a coal mine.

The district court held this provision arbitrary and unreasonable because it forecloses evidence that would refute total disability. This holding is based upon a misreading of Section 411(c)(4). Because the claimant must establish total disability, within the meaning of the Act, before the presumption of pneumoconiosis arises, the "only" clause does not operate until all evidence relevant to disability has been received. The Section does not preclude a mine operator from demonstrating that the claimant is not disabled. Proof of total disability is a condition precedent to the operation of the rebuttable presumption, and the government has so construed it.[49] The district court's constitutional conclusion thus must fall once its statutory misapprehension is corrected.[50]

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[49] The regulations implementing the Act provide that a miner must establish "total disability" by a sufficient factual showing. 20 C.F.R. 410.412, 410.422-410.426; 20 C.F.R. Part 718.

[50] The district court also concluded that Section 411(c)(4) is irrational because it places upon a specific coal mine owner the burden of proving that the respiratory or plumonary disease arose out of coal mine employment. The Section imposes no such burden. The "only" clause provided the manner in which the presumption contained in Section 411(c)(4) can be rebutted. The operator also can defeat liability by proving that the disability did not arise, at least in part, out of employment in his mines (30 U.S.C. 932(c)), in which event the Section 411(c)(4) presumption is irrelevant.

4. Plaintiffs are not entitled to a full trial at which they can introduce evidence concerning the rationality of Congress' decisions

Finally, plaintiffs contend that they are entitled to a trial, in order to present evidence to demonstrate that the medical presumptions and limitations upon rebuttal evidence are not consistent with the weight of medical authority. It may well be that the plaintiffs could put before the district court substantial medical authority to support their views; much evidence to that effect was before Congress itself.[51] But the district court's function is not to weigh the evidence and decide which path it would have followed if it were making the laws; its inquiry is limited to whether Congress has chosen a rational course. *Williamson* v. *Lee Optical Co.*, *supra*; *Ferguson* v. *Skrupa*, *supra*. The evidence adduced before Congress provides ample support for the statute's rationality and, as the district court correctly concluded, "[n]o meaningful argument has been presented challenging the power of Congress to make [its decisions] after receiving conflicting medical evidence about the disease" (J.S. 6A; footnote omitted).

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[51] See, *e.g.*, 1969 Senate Hearings, *supra*, n. 3, Part 3, at A91-A96; Leg. His., *supra*, n. 9, at 904.

CONCLUSION

Paragraphs (1) and (2) of the district court's judgment (J.S. 14A-15A) should be reversed. Paragraph (3) of the judgment (J.S. 15A) should be affirmed.

Respectfully submitted.

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